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No. 07-1289

Supreme Court, U.S.
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In The Supreme Court of the United States

NORMAL PARM, JR., et al.,

Petitioners,

versus

MARK W. SHUMATE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EAST CARROLL PARISH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* EDWARD WISNER DONATION IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Edward Wisner Donation, is a trust owning several thousand acres of land in south Louisiana for the benefit of the City of New Orleans, Charity Hospital, the Salvation Army, Tulane University and certain heirs of Edward Wisner ("Wisner"). Wisner submits this *amicus curiae* brief: 1 – pursuant to the consent of Petitioners and Respondent; 2 – in support of Respondent, Mark W. Shumate, in his official capacity as the Sheriff of East Carroll Parish; 3 – in support of the decision rendered by the United States Fifth Circuit Court of Appeal; and 4 – in opposition to the Petition for Writ of Certiorari and the unprecedented assault on the rights of landowners presented therein.

This *amicus curiae* brief addresses selected issues raised by Petitioners in their Petition for Writ of Certiorari. The issues briefed herein are of great interest and significant importance to Wisner and all landowners throughout the State of Louisiana. If

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[1] Pursuant to Rule 37(6) of the Rules of this Honorable Court, *amicus curiae* Wisner represents that no counsel for any party to this matter authored this *amicus curiae* brief in whole or in part. No party, no party's counsel and no person other than *amicus curiae*, its members or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 37(2)(a), *amicus curiae* Wisner represents that counsel of record for all parties timely received notice of *amicus curiae*'s intent to file this brief. Consent to the filing of this *amicus curiae* brief was granted by counsel for all parties.

Petitioners are able to convince this Honorable Court to grant their Petition and ultimately overturn the decision of the United States Fifth Circuit Court of Appeal, the owners of private property in the State of Louisiana stand to lose their constitutional rights to use and enjoy their property without interference from others. A reversal of the Fifth Circuit's decision would create confusion in the realm of Louisiana property law and potentially could have a substantial impact on the rights of property owners throughout the United States.

SUMMARY OF ARGUMENT

Petitioners have framed the question presented to this Honorable Court in a manner that misrepresents the holding of the Circuit Court. The Fifth Circuit did *not* hold, as Petitioners claim, that "the public has no federally created right, nor any federally protected right to travel on or use *any* of the navigable waters of America for recreational purposes." Petition for Writ of Certiorari ("Pet. for Writ"), p. 9. Nor did the Fifth Circuit create a "new Recreational Use Exclusion" to the public's right to recreate on "the navigable waters of America." Pet. for Writ, p. 1. Rather, the Fifth Circuit identified the key issue before it in terms of whether the public has a right to fish on private property, which is covered during the spring by flood waters of the Mississippi River. *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007). The court held that neither federal nor state law grants

Petitioners and/or the public in general that right. Accordingly, it affirmed the decision of the district court. *Id.* at 137.

At no stage of these proceedings have Petitioners addressed the fact that the underlying pre-requisite of their arguments simply does not exist. Their arguments rest on the incorrect and unproven assumption that the "waters" to which they claim a right of use and which are located on privately owned property are "navigable." The law and the facts establish that they are not. As this Court has repeatedly held, navigability as a matter of law means "navigable-in-fact" and susceptible to use for regular commerce.[2] *See, e.g., The Daniel Ball,* 77 U.S. 557, 1870 WL 12737 (1870). As discussed more fully below, Gassoway Lake and the other "waters" involved in this litigation simply do not meet the test for navigability. Under well-settled principles set forth in numerous decisions rendered by this Honorable Court and relied upon by the Fifth Circuit in reaching its decision, the alternative tests and authorities advanced by Petitioners are inapplicable and erroneous as a matter of law. *Parish*, 513 F.3d at 143-44.

In sum, neither Petitioners nor the public has any right to access or use the non-navigable waters

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[2] The definition of "navigable waters" is at the core of the issues before this Honorable Court. Nevertheless, in their Petition for Writ of Certiorari, Petitioners ignore the dispositive case law, including highly relevant decisions of this Court, on the issue of navigability.

located on the private property at issue, even when the property is temporarily covered by floodwaters. Because a reversal of the Fifth Circuit's decision denying Petitioners the extraordinary right they claim will have an adverse impact on the private property rights of Wisner and riparian landowners throughout the State of Louisiana, it is imperative that this Court affirm the decision of the Fifth Circuit and deny the Petition for Writ of Certiorari.

ARGUMENT

A. Petitioners Have Not Established that the Waters to Which They Seek Access Are Navigable.

The most glaring error in the position taken by Petitioners in the lower courts and here is their underlying and erroneous assumption that the waters that occasionally flood and temporarily cover the private property owned by *amicus curiae* Walker Cottonwood Farms, L.L.C. ("Walker") are, in fact, "navigable." Petitioners acknowledge that every rule or theory of law pursuant to which they seek relief from this Court, including cases under the Privileges and Immunities Clause, the Equal Footing Doctrine, federal common law and the federal navigational servitude, all require the presence of "navigable waters." Notwithstanding the great weight of authority requiring that waters to which the public has a right of access and use must be navigable, Petitioners ignore the fact that all of their arguments fail if the

waters to which they claim a public right of access and use – including Gassoway Lake, the drainage ditch and other "water bodies" on Walker's property – are not navigable-in-fact.

As pointed out by the Fifth Circuit, the Louisiana Second Circuit Court of Appeal in a related case found that under applicable Louisiana law, the "waters" at issue are not navigable-in-fact and, therefore, are *not* navigable water bodies to which the federal or any state navigational servitude applies. *Parm*, 513 F.3d at 140 [citing *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So.2d 1258, 1265-66 (La. App. 2 Cir. 2004), *writ den.*, 903 So.2d 442 (La. 2005)]. As shown below, this Honorable Court should apply its own long-standing decisions and reach the same conclusion as the Louisiana Second Circuit and the United States Fifth Circuit in order to secure the constitutionally and statutorily protected rights of landowners in the State of Louisiana.

1. This Court Has Articulated the Definitive, Dispositive Test for "Navigability" and Petitioners Cannot Meet It.

This Court has often stated the test for "navigability," though the elements of the test vary depending on its context.[3] Petitioners argue, *inter alia*, that

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[3] In *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72, 100 S.Ct. 383, 388-89 (1979), this Court acknowledged that the

(Continued on following page)

their "right" to fish on privately owned waters derives from both "a federal common law right of navigation" and the federal navigational servitude. Their arguments rest on the erroneous assumption that the floodwaters which sometimes cover the Walker property for a very limited period of time are part and parcel of the indisputably navigable waters of the Mississippi River. Petitioners ignore and/or tortuously attempt to distinguish a considerable body of federal and state law that differentiates a navigable waterway from floodwaters which occasionally emanate from that waterway and inundate land adjacent to – or, in this case, land located miles from – a navigable waterway. For the reasons and under the authorities set forth below, particularly the pronouncements of this Court, Wisner respectfully submits that the arguments of Petitioners should be rejected as being contrary to well-settled law, and the decision of the Fifth Circuit dismissing their claims should be affirmed.

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concept of navigability arises in cases involving: (1) the boundaries of the federal navigational servitude; (2) the scope of Congress' regulatory authority under the Commerce Clause of the Constitution; (3) the regulatory authority of the U.S. Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 403, *et seq.*; and (4) the jurisdictional limits of the federal courts in admiralty/maritime cases under Article III, Section 2 of the Constitution.

2. Commercial Use and/or the Susceptibility Therefor Is the Most Critical Element of the Applicable Test for "Navigability".

In *The Daniel Ball*, 77 U.S. 557, 1870 WL 12737 (1870), this Court established the traditional test for navigability on which the public's right of access and use claimed by Petitioners depends.[4] *The Daniel Ball* test has been applied to determine "navigability" in the context of the federal navigational servitude, Congress' power under the Commerce Clause and the Corps of Engineers' regulatory authority. In that seminal case this Court held:

> A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are *used, or are susceptible of being used, in their ordinary condition, as highways for commerce,* over which trade and travel are or may be conducted *in the customary modes of trade and travel on water.*

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[4] The foundation for Petitioners' claim of the right to fish upon Walker's property when parts of it are temporarily covered with water – i.e., that the "waters" are navigable – was not established through competent evidence by Petitioners in the district court. Moreover, in their Petition to this Court, Petitioners merely assert in a conclusory fashion with no legal support or factual evidence that "recreational navigation in today's America is as 'commercial' as towing a barge. . . . " Pet. for Writ, p. 20.

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their *ordinary condition* by themselves, or by uniting with other waters, *a continued highway over which commerce is or may be carried on* with other States or foreign countries in the customary modes in which such commerce is conducted by water. [Emphasis supplied].

The Daniel Ball, 77 U.S. at 563. This definitive and determinative test for "navigability" articulated by this Court more than one hundred years ago mandates a finding that the lands/waters to which the Petitioners claim a right of access and use are simply not navigable.

As stated above, Petitioners' claims rest on their erroneous and unfounded assumption that overflow waters of the Mississippi River, which seasonally flood Walker's land, are navigable-in-fact. Their contention, however, fails to take into account this Court's pronouncement that in order to be "navigable-in-fact," the waters in question must be being used, must have been used, or must be susceptible to use for "commerce." *Id.* As the record before the Court confirms, Petitioners submitted no evidence in the lower court proceedings to establish that the lands/waters over which they claim the right to navigate and fish are currently being used, have ever been used or are otherwise susceptible to being used for navigational "commerce."

This Court has defined "commerce" as "an exchange of commodities." *Id.* at 561. While some lower courts have expanded the definition of "commerce" in cases involving issues of navigability and the public's right of access to certain waters, the relevant jurisprudence limits the term to this Court's definition in *The Daniel Ball* and/or to the common and ordinary meaning of the word.[5]

Petitioners argue that the Fifth Circuit's holding in this case is "in direct conflict with [its] prior holding in *Silver Springs Paradise Company v. Ray*, 50 F.2d 356 (5th Cir. 1931). Pet. for Writ, p. 29. They contend that *Silver Springs* recognized a "federal common law right of navigation," which encompasses not just commerce but recreational use. *Id.* Petitioners are simply wrong. The Fifth Circuit neither recognized nor even mentioned a "federal common law right of navigation" in *Silver Springs*. Moreover, *Silver Springs* is distinguishable from this case because it involved a claim by riparian landowners to ownership of land located beneath waters that actually *did* meet *The Daniel Ball* "commerce" test for

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[5] "Commerce" is defined as "the exchange or buying and selling of commodities on a large scale involving transportation from place to place." Merriam Webster's Collegiate Dictionary, 10th Edition. "Commodity," a term used both by Webster's Dictionary and this Court in defining the term "commerce," is defined as "an economic good as a product of agriculture or mining; [and/or] an article of commerce especially when delivered for shipment." Merriam Webster's Collegiate Dictionary, 10th Edition.

navigability. In contrast, this matter involves a claim that Petitioners and the public have a right to access and use "waters" that are *not* navigable because they only occasionally and temporarily cover lands which, in their ordinary and natural condition, are dry and inaccessible by boat.

Petitioners also ignore the fact that the Fifth Circuit in *Silver Springs* drew a distinction between a riparian landowner's limited right to exclude the public from that portion of his submerged lands "bordering on public navigable waters" – which describes the lands in dispute in *Silver Springs* – and the landowner's "full and complete" title to land which is not directly connected to the navigable water – which describes the lands/waters located on Walker's property. *Silver Springs*, 50 F.2d at 358. In its brief to this Court, *amicus curiae* Walker explains that Petitioners and other trespassers are able to gain access to Gassoway Lake and/or the other "waters" at issue only by launching their boats into Bunch's Cutoff and then making their way through a man-made drainage ditch to the lakes, including Gassoway Lake, located on Walker's property. *See* Brief of *Amicus Curiae* Walker Cottonwood Farms, L.L.C., pp. 1-3 and nn. 1 and 2. Petitioners do not – as they try to make it appear – gain access to Gassoway Lake by launching their boats on the Mississippi River and then floating across the three and one-half miles of forest and crop lands that lie between the Mississippi and the lake. *Id.*

Moreover, in *Walker Lands*, the Louisiana Second Circuit Court of Appeal upheld the factual findings of the trial court in that related matter regarding Walker's property and the drainage ditch, which findings included:

> [T]he outlet/drainage ditch is in fact a drainage ditch of Gassoway Lake that has been altered by man and is not a navigable stream as perceived by the [Louisiana] Civil Code.
>
> [The ditch] makes a ninety degree angle at one point, due to materials placed by man. . . .
>
> During many times of the year, the ditch has insufficient water for the smallest boats to travel from Bunch's Cutoff up through the ditch into Gassoway Lake.
>
> [T]he amount of vegetation in the ditch prohibits traversal of this area during certain times of the year and even during high water, one would have to leave the banks of the ditch and cross private land and run along beside the ditch to gain access to Gassoway Lake.

Id.

Thus, unlike the land and waters at issue in *Silver Springs*, Gassoway Lake, the drainage ditch and other parts of Walker's property to which Petitioners claim a right of access and use have "no direct connection" with the navigable Mississippi

River and, therefore, are *not* themselves navigable. *Silver Springs*, 50 F.2d at 358.

In sum, the waters to which the public claimed a right of access in *Silver Springs* were clearly "navigable" under the applicable navigational "commerce" test. *The Daniel Ball, supra.* That is, the waters of Silver Springs had been previously and/or were currently being used as a continuing highway of interstate commerce – i.e., for commercial, navigational purposes. Again, the arguments of Petitioners in this case must fail because they entirely disregard the issue of and test for "navigability" – a critical element which they must establish in order for their public access/use claim to succeed.

Also instructive is the Fifth Circuit's recent decision in *In re: Needham*, 354 F.3d 340 (5th Cir. 2003), a case arising under the Oil Pollution Act of 1990, 33 U.S.C.A. § 2701, *et seq.* The question presented was whether the waterway at issue – the "Company Canal" – was navigable-in-fact.[6] The Company Canal was "an industrial corridor between the Intracoastal Waterway and Bayou LaFourche," which contained shipyards, repair facilities, drydocks and other commercial enterprises. *Id.* at 347. Applying

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[6] Although *In re. Needham* is distinguishable from the case before this Court because it involved the question of whether an oil spill in the waterway was subject to federal regulation, the test applied by the court in *Needham* as to navigability – *The Daniel Ball* test of navigational commerce – is the same test applicable in this case. *Needham*, 354 F.3d at 346-47.

The Daniel Ball test for navigability, the court held that even though it was an inland waterway, the Company Canal was "navigable-in-fact" because it "supports *commerce*, is unobstructed, and is traversed on a consistent basis." *Id.* [Emphasis supplied]. Since the oil spilled into Bayou Folse, which was "adjacent" to the Company Canal, "an open body of navigable water," the spill was covered by the statute. *Id.*

Applying the same criteria utilized in *Needham* to this case, it is clear that the waters located on the Walker property to which Petitioners seek a right of use do not meet the test for navigability. Accordingly, there is no public right of access to those properties whether they are dry, which is their natural, ordinary condition, or temporarily covered by floodwaters that have meandered across the dry land from the Mississippi River, three and one-half miles away.

In a case involving recreational use of a waterway, *Lykes Bros. Inc. v. U.S. Army Corps of Engineers*, 821 F.Supp. 1457 (M.D. Fla. 1993), *aff'd.*, 64 F.3d 630 (11th Cir. 1995), Petitioners sued the Corps of Engineers challenging its finding that Fisheating Creek was in part a navigable water of the United States and, therefore, subject to the Corps' regulatory authority under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 403, *et seq.*[7] In setting aside

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[7] Although *Lykes Bros.* is distinguishable from the case before this Court, it did involve the issue of what constitutes "navigability" under *The Daniel Ball* test and held, as should this Court in this matter, that recreational uses of a land-locked

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the Corps' determination of navigability, the court in *Lykes Bros.* also relied on and applied this Court's test for navigability as set forth in *The Daniel Ball*. *Lykes Bros.*, 821 F.Supp. at 1462-63. The court held in pertinent part as follows:

> (1) Fisheating Creek is not a navigable waterway because it "has not been used and has not be [sic] susceptible for use to transport interstate *commerce*". . . . *Id.* at 1463;
>
> (2) "To be considered susceptible for commercial navigation, the waterway *in its ordinary and natural condition* must have a sufficiently well-defined, passable channel, and the water levels must be able to sustain *commercial navigation on a predictable and reliable basis*. . . . One cannot reliably predict weather and accordingly the amount of rain in the FEC basin." *Id.*;
>
> (3) "*Evidence of navigation during periods of flooding or abnormally high water is not sufficient to support a finding of navigability.*" *Id.*;
>
> (4) An "adventure trip for recreational purposes . . . does not support a conclusion that Fisheating Creek has been used or

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waterway, such as the "waters" at issue here, do *not* constitute "commerce" for purposes of determining navigability. *Lykes Bros.*, 821 F.Supp. at 1464.

is susceptible of being used for commercial navigation." *Id.* at 1464;

(5) "*The recreational activities of these non-commercial fishing excursions . . . do not render FEC susceptible of being used as an artery of commerce.*" *Id.*; and

(6) "*A land-locked waterway with no direct navigable link to interstate or foreign waterways cannot be considered a 'navigable waterway of the United States'* under the *Daniel Ball* test." *Id.* at 1465.

[Emphasis supplied and citations omitted]. *Id.* at 1463-65.

Similarly, in this case, there is no evidence that Gassoway Lake or the other "waters" on Walker's land have ever been used for navigational "commerce" in the legal, ordinary or common-sense meanings of the word. *Walker Lands,* 871 So.2d at 1266. The waters that occasionally spill over the banks of the Mississippi River and flood the lands owned by Walker have no "well-defined, passable channel." *Id.* The occasional floodwaters that submerge Walker's property are not "predictable or reliable." *Id.* It defies logic, common sense and applicable law to suggest that these temporary floodwaters, which on rare and unpredictable occasions cover the lands owned by Walker, are, in the words of the court in *Lykes Bros.*, "susceptible of being used as an artery of commerce"

and, therefore, navigable. *Lykes Bros.*, 821 F.Supp. at 1464.[8]

After a full presentation of evidence by all of the parties, the Louisiana Second Circuit Court of Appeal found that Gassoway Lake is "landlocked," "not connected to a navigable body of water" and, therefore, "can serve no useful *commercial* purpose." [Emphasis supplied]. *Walker Lands*, 871 So.2d at 1264-66. Moreover, the drainage ditch by which the Petitioners gain access to Gassoway Lake is "completely dry for most of the year," making the lake inaccessible by boat most of the time. Finally, the Louisiana Second Circuit found – as did the United States Fifth Circuit – that recreational use of a waterbody is *not* use for a commercial purpose. *Id.* at 1266; *Parm*, 513 F.3d at 143.[9] Accordingly, "Gassoway

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[8] As the court in *Loving v. Alexander*, 548 F.Supp. 1079 (W.D. Va. 1982), *aff'd.*, 745 F.2d 861 (4th Cir. 1984), said:

> . . . susceptibility for use or actual usage implies regularity and predictability of usage. 'If the waterway is merely capable of exceptional transportation during periods of high water, *it is not navigable*.' [Emphasis supplied].

Id. at 1086-87.

[9] *See* also *Kieff v. Louisiana Land and Exploration Company*, 779 So.2d 85 (La. App. 4 Cir. 2001), which directly refutes Petitioners' argument here that navigation rights should not be limited to commerce but should be extended to include recreational use. In *Kieff*, the court considered what constitutes "navigability" in the context of the Louisiana recreational use immunity statutes (La. R.S. 9:2791 and 9:2795). The court held that commerce or potential commerce on a body of water was

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Lake is a non-navigable body of water that is owned by a private entity" – namely, Walker. It is, therefore, "a private thing." *Walker Lands*, 871 So.2d at 1266.

Finally, in a case closely analogous to the one at bar, *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991), the Eleventh Circuit Court of Appeal addressed the same navigability and public access issues confronting this Honorable Court. In *Harrell*, the U.S. Army Corps of Engineers (the "Corps") challenged the trial court's finding that Lewis Creek, a tributary of the Tombigbee River, itself "a major artery of *commerce*," was *not* a navigable waterway. [Emphasis supplied]. *Id.* at 1037-38. Like Petitioners here, private parties also claimed a right of access to Lewis Creek during times of high water for purposes of fishing. The Harrells, riparian landowners, claimed that the private parties had no right to fish the stretch of Lewis Creek that ran through their property, since that portion of the creek was non-navigable.

The Harrells' property, like Walker's in this case, abutted "a major artery of commerce," namely, the Tombigbee River. Like the property at issue here, in its ordinary condition the Harrells' land was covered with grasses, trees and other terrestrial vegetation because it was not under water except for very short

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determinative of the navigability issue. "The fact that an oysterman or a crabber might, on occasion, pass through the area . . . on a small boat does not make it a highway for interstate or foreign commerce." *Kieff*, 779 So.2d at 92.

periods of time. *Id.* at 1042. The evidence presented in *Harrell* also established that Lewis Creek only became capable of use for commerce when the floodwaters of the Tombigbee River broke out of their banks on the main course of the river and backed-up across the intervening lands into Lewis Creek. *Id.* at 1039. That is the exact situation presented in this case. Gassoway Lake and the other Walker properties to which Petitioners claim a right of access and use only contain water sufficient to float small boats when the Mississippi River – whose channel is located three and one-half miles from Gassoway Lake – overflows its banks and its floodwaters meander over low-lying portions of Walker's land.[10]

In reaching its conclusion that Lewis Creek is non-navigable, the court was persuaded that Lewis Creek – which, like Gassoway Lake, was located three miles from the Tombigbee River – "is impassable

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[10] It is significant that in *Harrell* the court found that Lewis Creek was not navigable-in-fact even though it was used for commerce during times of high water by the private parties who commercially fished the creek. The evidence also established that in the past others had used the creek for commercial purposes such as floating logs, poles and rafts downstream. Even with that evidence, however, the court held that such activities do "not make [Lewis Creek] a navigable river." *Id.* at 1038 and 1040; *see* also, *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 773 (1899). This Court should draw the same conclusion in this case, particularly in light of the fact that Petitioners here have presented no evidence whatsoever of any commercial use of Gassoway Lake or the other waters at issue.

under *ordinary* conditions prevailing throughout the year." *Id.* at 1040. Relying on this Court's decision in *United States v. Utah*, 283 U.S. 64, 51 S.Ct. 438, 445 (1931), the *Harrell* court reasoned that "susceptibility of use as a highway *for commerce* should not be confined to 'exceptional conditions or short periods of temporary high water.'" [Emphasis supplied]. *Harrell*, 926 F.2d at 1040.

As stated above, Petitioners in this case do not even allege that they or others have made any *commercial* use of the "waters" in question, nor do they allege that Gassoway Lake and the other so-called water bodies upon which they have trespassed were ever used for navigational *commerce* or are presently susceptible for such use. They have alleged only – and erroneously – that the floodwaters that occasionally cover low-lying portions of the three and one-half miles of land located between the Mississippi River and Gassoway Lake are part and parcel of the unquestionably navigable waters of the Mississippi River and, therefore, they and the public in general have a right to navigate over and fish on the waters of the Mississippi River. This Court should reject their argument in this regard because, as the Louisiana Second Circuit Court of Appeal has already found, Gassoway Lake does not lie in the bed of the Mississippi River, nor is it a channel of the river since it is cut off from it. *Walker Lands*, 871 So.2d at 1264. Accordingly, that court upheld the trial court's finding that Gassoway Lake, the drainage ditch and other "water bodies" are not navigable bodies of water. *Id.*

at 1266. This Court should reach the same conclusion.

B. Petitioners Cannot Establish a Public Right of Access or Use Through the Federal Navigational Servitude.

In *Harrell, supra,* the court also addressed the Corps' claim that as a result of the Tombigbee floodwaters, Lewis Creek was subject to the navigational servitude of the United States. Employing logic, common sense and applicable case law – in particular opinions rendered by this Court – the Eleventh Circuit rejected the Corps' argument. The court noted that "navigability" is a federal question and reviewed decisions by the federal courts establishing the rule that the government's navigational servitude does not extend beyond the "ordinary high water mark." *Harrell*, 926 F.2d at 1041-42. The court assessed the Corps' regulatory definition of "ordinary high water mark" in light of the "limits set forth by the federal courts." *Id.*

The Corps argued that its "navigational servitude extends laterally over the entire area covered by the ordinary high waters of the stream, including tributaries that might not otherwise be considered navigable and areas adjacent to the low water channel that revert to a swampy or even a dry condition as the waters recede." *Id.* at 1043. That is the same argument made by Petitioners in this matter. In rejecting the Corps' claim, the *Harrell* court held:

> We reject any attempt by the Corps to extend . . . the regulatory jurisdiction of the United States to farmland and hardwood forests in these bottomlands simply because the Tombigbee River periodically floods its banks during the winter and spring wet months. *To argue that the government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee River is ludicrous.*
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> * * *
>
> [To adopt the Corps' definition] 'would recognize no horizontal limits to the 'bed' of a navigable river in those areas where the banks are relatively low and flat. . . .'
>
> * * *
>
> There must . . . be horizontal limits to the 'bed' of a river; otherwise, the navigational servitude would extend indefinitely in all directions and swallow up any claim for 'just compensation' under the Fifth Amendment for damages occurring anywhere below the elevation of the high-water mark. [Emphasis supplied].

Id. at 1043.

As the Fifth Circuit did in this case, the *Harrell* court acknowledged that state law governed the question of "public access to Lewis Creek during periods when the Tombigbee floods its banks." *Id.* at 1044. However, since the State of Alabama does not own non-navigable waters, such as Lewis Creek, the

court held, "the public has no right of access." *Id.* Similarly, under Louisiana law, the public owns "the waters and bottoms of natural navigable water bodies," while the banks are "private things" belonging to the riparian landowner and subject to very limited public uses. *See* La. Civ. Code Ann. arts. 450 and 456.

Wisner respectfully submits that the decision in *Harrell* is on point and, together with the decision of the Louisiana Second Circuit Court of Appeal in *Walker Lands, supra,* and the great weight of this Court's many prior decisions, should be regarded as dispositive of the issues of navigability, the federal navigational servitude and the public right of access to privately owned property.

C. The Fatal Flaw in Petitioners' Claim Is that They Did Not Establish that the "Waters" to Which They Seek a Right of Access Are Navigable.

The fact that applicable law – as cited by Petitioners themselves – requires that the waters to which they seek a right of access and use be navigable is the fatal flaw in their argument. Petitioners acknowledge the navigability requirement only in a general manner and then pretend that they have satisfied it, without citing any supporting evidence.

Nearly every case cited and relied upon by Petitioners in their Petition to this Court specifically states that the public has no right of use as to waters that are not "navigable." Petitioners, however,

proceed in their arguments as though the requirement is non-existent or had somehow been met by them, despite their failure to cite any evidence to that effect. The following authorities relied upon by Petitioners establish that the public's right to access and use is conditioned on proof that the waters are or were historically navigable – i.e., used or susceptible to being used for commerce: *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842) (Pet. for Writ, pp. 21-22 and 26); *Morris v. U.S.*, 174 U.S. 196, 19 S.Ct. 649 (1899) (Pet. for Writ, p. 22); *The Volant* [cited by Petitioners as *Smith v. Maryland*], 59 U.S. 71, 1855 WL 8275 (1855) (Pet. for Writ, p. 23); *Slaughter-House Cases*, 83 U.S. 36, 1872 WL 15386 (1873) (Pet. for Writ, pp. 23-24); United States Congressional Statutes at Large, Vol. 2, pp. 642 and 703 (1811) (Pet. for Writ, p. 25); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548 (1894) (Pet. for Writ, p. 26); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 33 S.Ct. 667 (1913) (Pet. for Writ, p. 27); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 70 S.Ct. 885 (1950) (Pet. for Writ, p. 27); *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578 (1897) (Pet. for Writ, p. 27); *Coastal Petroleum Co. v. United States*, 524 F.2d 1206 (5th Cir. 1975) (Pet. for Writ, p. 27); 33 C.F.R. 329.11(a) (Pet. for Writ, p. 28); *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499 (1894) (Pet. for Writ, p. 30); *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979) (Pet. for Writ, p. 31); *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931) (Pet. for Writ, p. 31); *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428 (1912) (Pet. for Writ, pp. 31-32 and 34); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576 (La. 1974) (Pet.

for Writ, p. 33, n. 16); *O'Brien v. State Mineral Bd.*, 24 So.2d 470 (La. 1945) (Pet. for Writ, p. 33 n. 16); *State v. Barras*, 615 So.2d 285 (La. 1993) (Pet. for Writ, pp. 33-34); *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005), *cert. denied*, 546 U.S. 1174, 126 S.Ct. 1340 (2006) (Pet. for Writ, p. 34); *Ryals v. Pigott*, 580 So.2d 1140 (Miss. 1990) (Pet. for Writ, p. 34); *Gwathmey v. State*, 464 S.E.2d 674 (N.C. 1995) (Pet. for Writ, p. 34); *Delinks v. McGowan*, 173 A.2d 488 (Conn. 1961) (Pet. for Writ, p. 34); *City of Providence v. Comstock*, 65 A. 307 (R.I. 1906) (Pet. for Writ, p. 34); and *Thiesen v. Gulf F. & A. Railway Co.*, 78 So. 491 (Fla. 1917) (Pet. for Writ, p. 34).

Thus, throughout their Petition, Petitioners acknowledge that applicable law allows the public access and use of the waters of the United States and the various states *only* if those waters are "navigable." Nevertheless, Petitioners have presented their Petition for Writ of Certiorari to this esteemed and Honorable Court – which itself established the navigability requirement for public access to federal and state waters – without addressing this most axiomatic of principles and with full knowledge that they have not satisfied the requirement. For this reason alone, Petitioners should be denied relief by this Court.

CONCLUSION

The central issue in the case confronting this Honorable Court involves a determination whether Gassoway Lake, the drainage ditch and other parts of

Walker's property are navigable-in-fact and, therefore, navigable-at-law. Contrary to Petitioners' far-reaching arguments, sweeping mischaracterizations of the facts and erroneous statements of the law, there are clear legal precedents in analogous cases that this Court has previously decided, which establish that a determination of navigability rests on whether the water body at issue is or ever was navigable-in-fact, i.e., capable of supporting interstate commerce. The law, the facts and common sense mandate that Petitioners' attempts to overturn more than a century of well-settled law established by this Court regarding navigability, and to have this Honorable Court grant them the right to trespass at will on private property, be rejected. The preservation of one of the most important foundations of our democracy – the right to enjoy one's private property without interference from others – depends on it.

Respectfully submitted,

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